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No. 00-1595

IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUND, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record

Of Counsel:

MICHAEL RUBIN
177 Post Street
San Francisco, CA 94108

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 66 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief as *amicus curiae* in support of respondent with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT

In its first decision in this case, the National Labor Relations Board found that Hoffman Plastic Compounds, Inc. "discriminatorily selected [four] union adherents for [a January 31, 1989] layoff" and, based on that finding, the Board issued a standard reinstatement and backpay order. *Hoffman Plastic Compounds, Inc.*, 306 NLRB 100, 100 & 101 (1992).

In the ensuing NLRB compliance proceedings, the NLRB General Counsel sought immediate reinstatement and full backpay for the discriminatees, including Jose Castro. D.C. Cir. App. 150. Hoffman Plastic's initial counter was that "[t]he backpay period for Jose Castro ended on or about March 10, 1989, the date that he was tendered a valid offer of reinstatement." D.C. Cir. App. 206. After the compliance hearing, at which Castro stated during his testimony that "he is not a citizen of the United States" and that "he works in the U.S. based on a birth certificate that is not his own," Hoffman Plastic added that, because of Castro's testimonial admission

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

of his "unauthorized alien" status, no backpay order would lie. *Hoffman Plastic Compounds, Inc.*, 326 NLRB 1060, 1060-61 (1998).

In its compliance decision, the Board treated with both of Hoffman Plastic's backpay defenses:

> • As to Hoffman Plastic's "reinstatement-offer" defense, the Board ruled that the Company's March 10, 1989 offer was not sufficiently definite to be a valid offer of reinstatement that cuts off backpay liability. 326 NLRB at 1061.
>
> • As to Hoffman Plastic's "unauthorized alien" status defense, the NLRB—following its leading decision in *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408 (1995), *enf'd*,134 F.3d 50 (2d Cir. 1997) and in light of Castro's testimonial admission of his "unauthorized alien" status—rescinded its order that the Company reinstate Castro and limited Castro's backpay so that it ran from the date of his discriminatory layoff and ended on the date on which Castro testified to his unauthorized alien status. 326 NLRB at 1061.

In petitioning for review of the NLRB's decision, Hoffman Plastic argues that because of Castro's "unauthorized alien" status, no backpay order will lie.

SUMMARY OF ARGUMENT

In unfair labor practice cases involving an employer's discriminatory discharge of an employee in violation of the National Labor Relations Act, the standard NLRA remedial order requires the employer to reinstate the employee and to make the employee whole for any wages or benefits lost as a result of the discharge. Obedient to this Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the National Labor Relations Board limits this standard remedy in cases involving an employer's discriminatory discharge in violation of the NLRA of employees who have an "unauthorized alien"

status. In such cases, the Board conditions reinstatement on the employee's presentation to the employer of the authorization documents required by the Immigration Reform and Control Act of 1986 (IRCA). The Board also limits the backpay remedy to a period beginning on the date of discharge and ending either upon reinstatement consistent with IRCA or upon the employee's failure to present the necessary authorization documents within a reasonable period. Where, as here, the employer first learns of the discriminatee's "unauthorized alien" status after the discriminatory discharge, the Board treats this after-acquired evidence as grounds for denying reinstatement and for terminating the backpay period as of the date the employer first learned of the discriminatee's status.

Providing this limited backpay remedy in unfair labor practices cases involving an employer discriminatory discharge of "unauthorized alien" employees in violation of the NLRA furthers the purposes of the NLRA by dissipating the coercive effect of the discharge on the discriminatee's fellow workers and by deterring the employer commission of such unfair labor practices. And, this limited backpay remedy does not conflict with the immigration laws or encourage employers or "unauthorized alien" employees to take any action that is in violation of the immigration laws.

Contrary to Hoffman Plastic's submission, this Court's *Sure-Tan* decision does not preclude Board orders providing a backpay remedy to "unauthorized alien" employees. Rather, *Sure-Tan* instructs the Board, taking the immigration laws into account, to devise remedies attuned to the nature of the particular employer unfair labor practice against the "unauthorized alien" employees and the effect of the employer's wrongful act on the employees. The Board has heeded that instruction in divising its limited backpay remedy for an employer discriminatory discharge of an "unauthorized alien" employee.

ARGUMENT

"The [National Labor Relations] Act expressly authorizes the Board 'to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act].' 29 U.S.C. § 160(c)." *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 324 (1994). The Immigration Reform and Control Act of 1986 ("IRCA"), in its turn, makes it "unlawful . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in [IRCA] subsection (h)(3)) with respect to such employment." 8 U.S.C. § 1324a(1)(A).

In this NLRA unfair labor practice case—as in all its post-*A.P.R.A.* cases where the unfair labor practice is an employer discriminatory discharge in violation of the NLRA of an "unauthorized alien" employee—the NLRB took IRCA's employment provisions into account in fashioning a backpay remedy. The question presented is whether the Board, in fashioning the limited backpay remedy here, has taken proper account of IRCA and of the immigration polices IRCA embodies.

Hoffman Plastic argues that this Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), holds that the immigration laws preclude NLRB orders providing for backpay in all cases involving employer unfair labor practices against "unauthorized alien" employees and that *Sure-Tan* thus requires the conclusion that the backpay order here is improper. The Company's argument rests on an erroneous reading of *Sure-Tan*.

Sure-Tan—which, it is important to note, arose in a distinct legal context at several removes from this case—most assuredly teaches two general lessons of import for all unfair labor practice cases involving employer discrimination in violation of the NLRA against "unauthorized alien" employees:

- *First*, "the NLRA [does] apply to unfair labor practices committed against undocumented aliens." 467 U.S. at 891.
- *Second*, "[i]n devising remedies for [such] unfair labor practices, the Board is obliged to take into account . . . the objective of deterring unauthorized immigration that is embodied in the [immigration laws]." 467 U.S. at 903.

Beyond those two points, *Sure-Tan* teaches a third lesson of import for the legally distinct *Sure-Tan* class of unfair labor practice cases and for that class of cases alone. Read to its limit, *Sure-Tan* goes only so far as to approve, as *a* proper means of taking account of the immigration laws, the court of appeals' ruling in that case—uncontested by either the employer or the Board in this Court— that backpay to unauthorized alien discriminatees is to be tolled during the period the discriminatees are unavailable for work *by reason of their deportation from the United States and their inability to lawfully reenter the country consistent with the immigration laws*. And, the *Sure-Tan* Court approved that ruling on the ground that it properly assures that the NLRB backpay remedy does not work at odds with the immigration laws *by encouraging the deported unauthorized aliens to commit a second violation of the immigration laws by illegally reentering the United States*. Nothing in *Sure-Tan* states, and nothing in its rationale suggests, that the Board, in devising remedies for employer unfair labor practices that do not accomplish the discriminatees' deportation must, to take proper account of the immigration laws, deny backbay.

Against that background, our argument is devoted to two points:

- We first review and discuss the Board's remedial rules for unfair labor practice cases that involve an

employer discharge in violation of the NLRA of "unauthorized alien" employees to demonstrate that the Board has properly heeded the *Sure-Tan* Court's admonition that "[i]n devising remedies for [such] unfair labor practices, the Board is obliged to take into account . . . the objective of deterring unauthorized immigration that is embodied in the [immigration laws]." 467 U.S. at 903.

- We then review in detail the *Sure-Tan* litigation and this Court's *Sure-Tan* decision to demonstrate that the Court's approval of a backpay tolling rule there pertained to the propriety of placing such a limit on that remedy in the legally distinct *Sure-Tan* class of unfair labor practice cases and *not* to the propriety of that limit on the backpay remedy in other classes of unfair labor practice cases involving "unauthorized alien" employees.

1. A. In *A.P.R.A. Fuel Oil Buyers Group, supra*, the NLRB addressed, for the first time, "the issue whether the language and legislative intent of IRCA conflict with or override [the Board's] statutory authority to remedy unfair labor practices and to exercise [its] judicially recognized discretion in determining what form such remedies should take." 320 NLRB at 411.

"After considering the many complexities of the policies underlying both statutes," the *A.P.R.A.* Board "conclude[d] that the most effective way for the Board to accommodate—and indeed to further—the immigration policies IRCA embodies is, *to the extent possible*, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees." 320 NLRB at 415 (emphasis added). At the same time, the *A.P.R.A.* Board was careful to "temper [the] traditional [NLRA] reinstatement remedy so that IRCA's provisions are satisfied," and to do so in a manner that complies with this Court's "admonition in *Sure-Tan* that the Board may not order remedies that entail conduct in violation of immigration statutes." *Id.*

The well-settled general NLRA remedial rule is that, "in all but a few cases involving discriminatory discharges . . . in violation of section 8(a)(3), the Board has ordered the employer to offer reinstatement to the employee discriminated against and to make whole such employee for any loss of pay that he has suffered by reason of the discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 420 n. 12 (1975)(internal quotation marks and citation omitted).

By its nature, the reinstatement order is a forward-looking injunctive remedy: it requires the employer to act to undo his earlier wrongful act—the discriminatory discharge—by offering the discharged employee reinstatement to the employee's former position in the employer's workforce. *See* 3 *NLRB Casehandling Manual* § 10529 (Sept. 1993) ("Reinstatement Offers"). The backpay order, by contrast, is a retrospective compensatory remedy: it does not require any corrective action by the employer but rather proceeds on the law of damages presumption that but for the wrongful discharge the discriminatee would have continued in employment and would have continued to receive the emoluments of employment, *see NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965)("The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer.), that is subject to rebuttal by proof that an intervening action or event would have resulted in a lawful interruption or termination of the discriminatee's continuing employment, *see* 3 *NLRB Casehandling Manual* § 10546 (tolling backpay during any period the discriminatee would have been otherwise unavailable for continued employment due, for example, to illness, *id.* § 10546.2, military service, *id.* § 10546.6, incarceration, *id.* § 10546.8, or travel outside the country, *id.*).

Given their different natures, the *A.P.R.A.* Board separately considered how to effectuate a proper intersection between

the NLRA reinstatement remedy and IRCA and then considered the proper intersection between the NLRA backpay remedy and IRCA.

The Board, first of all, "condition[ed] the Respondent [employer's] obligation to reinstate the[] individuals [who that employer had discriminatorily discharged in violation of the NLRA] on the individuals' production, within a reasonable time, of documents enabling the Respondent to meet its obligation under IRCA to verify their eligibility for employment in the United States." 320 NLRB at 408. Specifically, the employer was "ordered to offer [the undocumented alien] discriminatees . . . . reinstatement" only on the condition that the discriminatees "present, within a reasonable time, INS Form I-9 and the appropriate supporting documents, in order to allow the Respondent [employer] to meet its obligations under IRCA." *Id.* at 415.

The *A.P.R.A.* Board then tempered the NLRA backpay remedy by

> order[ing] that the Respondent [employer] pay the employees backpay from the dates of their discharges to the earliest of the following: their reinstatement by the Respondent, subject to compliance with the Respondent's normal obligations under IRCA, or their failure after a reasonable time to produce the documents enabling the Respondent to meet its obligations under IRCA to verify their eligibility for employment in the United States. [320 NLRB at 416.]

The Board explained that "awarding backpay to [undocumented alien discriminatees] effectuates the policies of the [National Labor Relations] Act" by "provid[ing] a measure of compensatory relief" to "employees [who] would have retained their jobs with the Respondent but for their union activities and the Respondent's unlawful retaliation for them." 320 NLRB at 415-416. The Board added that "the backpay [award], as limited by [the *A.P.R.A.*] decision,"

does *not* "induce the Respondent to illegally rehire the discriminatees in order to terminate its backpay liability." *Id.* at 416.

Finally, the *A.P.R.A.* Board made clear that in cases—such as the instant case—where the employer has hired and then discriminatorily discharged an employee in violation of the NLRA without, at either time, being aware that the employee has an "unauthorized alien" status, but thereafter becomes aware of the employee's status, the Board will apply its "after-acquired evidence" rule, 320 NLRB at 416 n. 44, which balances the Board's "responsibility to remedy unfair labor practices" against the employer's right to discharge an employee "at the time the employer acquire[s] knowledge of [the employee's] misconduct," *Axelson, Inc.*, 285 NLRB 862, 866 (1987).

In that light, the *A.P.R.A.* Board ruled that in the circumstances of the employer's after-the-fact discovery of a discriminatee's "unauthorized alien" status, the employer is *not* ordered to reinstate the discriminatee and the employer's backpay liability ceases at the time the employer first learns of the discriminatee's status.

At the same time, the *A.P.R.A.* Board also ruled that backpay would be awarded from the date of the discharge to the date the employer thereafter acquired evidence of the discriminatee's "unauthorized alien" status. The Board's rationale for awarding a limited amount of backpay in these circumstances is that "relieving the Respondent [employer] of all backpay liability, including that for the period when the Respondent had no knowledge of [the employee's status] and had no lawful reason to fire him, would provide an undue windfall for the Respondent." *John Cuneo, Inc.*, 298 NLRB 856, 856 (1990).[2]

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[2] In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), this Court approved an identical rule for Age Discrimination in

In sum, the Board, as the *A.P.R.A.* decision makes abundantly clear, has in the most careful and conscientious manner crafted NLRA remedies for cases involving employer discharges in violation of the NLRA of "unauthorized alien" employees that "take into account . . . the objective of deterring unauthorized immigration that is embodied in the INA [and in IRCA]." 467 U.S. at 903.

B. Where the NLRB has fashioned limited NLRA remedies that take account of "important Congressional objectives" reflected in a statute other than the NLRA, *Southern S.S. v. NLRB*, 316 U.S. 31, 47 (1942), the Board's determinations on remedy should stand as long as its remedial rules "effectuat[e] . . . the policies of th[e] Act," 29 U.S.C. § 160(c), and do not conflict with that other statute or rest on an incorrect assessment of the congressional objectives embodied therein. In the first regard there can be no doubt that the Board's limited backpay remedy for cases involving an employer discharge in violation of the NLRA of an "unauthorized alien" employee effectuates the policies of the Act and that a rule precluding backpay in all such cases would not.

i. As this Court recognized in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177 (1941), "Congress explicitly disclosed its purposes [in the NLRA by] declaring [in § 1] the policy which underlies the Act," *id.* at 182, and in NLRA § 10(c) Congress then "directs the Board 'to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act,'" *id.* at

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Employment Act cases on similar policy grounds. As the Court said there, "barring any recovery of backpay [for an employee who, prior to discharge, engaged in wrongdoing later discovered by the employer] would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination." *Id.* at 362.

187-188.[3] And, as stated in § 1 of the Act, Congress's "ultimate concern . . . was 'to eliminate the causes of certain substantial obstructions to the free flow of commerce,'" and "[t]his vital purpose was to be accomplished 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association.'" *Phelps Dodge*, 313 U.S. at 182, quoting 29 U.S.C. § 151. *See NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 265-266 (1938).

In implementing NLRA § 10(c) the Board has long recognized that among the "more significant[]" purposes served by providing back-pay to a discriminatee is "dissipat[ing] the deeply *coercive effects upon other employees* who may desire self-organization, but have been discouraged therefrom *by the threat to them implicit in the discrimination.*" *Ford Motor Co.*, 31 NLRB 994, 1099-1100 (1941) (emphasis added). "[A]nti-union discrimination exercises a coercive effect not only upon the immediate victim, but upon all present or future employees of the particular employer," because "it impresses upon them the

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[3] The use of the phrase "effectuate the policies of this Act" in NLRA § 10(c) as the touchstone for the Board's remedial authority reflects a conscious decision by Congress to "refer[] directly back to the statement of policies in section 1." *Memorandum Comparing S. 1958, 74th Cong., 1st Sess. with the Substitute for S. 2926, 73d Cong., 2d Sess.* 34 (1935), reprinted in 1 NLRB, *Legislative History of the National Labor Relations Act 1935* 1360 (1949). An earlier version of the proposal that was eventually enacted as the NLRA would have granted the NLRB authority to order persons found to have committed unfair labor practices to "take such affirmative action or perform any other acts that will achieve substantial justice under the circumstances." *Id.* The reason given for this change was that "[t]he phrase 'substantial justice' has no real significance in terms of the problems of this act, whereas the phrase 'effectuate the policies of this act' refers directly back to the statement of policies in section 1." *Id.*

danger to their welfare and security associated with membership in or activity on behalf of a labor organization." *Id.* at 1099.

The *in terrorem* effect of the employer's discharge of union supporters on their co-workers is not mitigated by the circumstance that the victims of unlawful employer retaliation are "unauthorized alien" employees. Nor is there a less "salutary effect" in providing backpay to the discharged "unauthorized alien" employee for that wrong as "assurance of the employer's future good faith not only to the discharged employee but to his fellow employees as well." *English Freight Co.*, 67 NLRB 643, 658 (1946).

It was for precisely these reasons that the *A.P.R.A.* Board thought it necessary "to the extent possible, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees." 320 NLRB at 415. The Board expressed concern that existence of a class of "powerless and desperate undocumented workers would certainly chill the American and authorized alien workers' exercise of their Section 7 rights." *Id.* at 414. And, the Board concluded that providing "a measure of compensatory relief" to undocumented workers, *id.* at 416, will demonstrate that "workplace abuses" cannot be committed with "relative impunity," *id.* at 414.

In addition, requiring an employer to make a discriminatee whole for his unlawful discharge "further[s] the public interest in deterring such discharges." *Mastro Plastics*, 354 F.2d at 175. By restoring the situation, "as nearly as possible, to that which would have obtained but for the illegal discrimination," *Phelps Dodge*, 313 U.S. at 194, the backpay remedy "prevent[s the employer's] enjoyment of any advantage which he has gained by violation of the Act," *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940), and thus act as a "deterrence of unfair labor practices," *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969).

Conversely, without "the reasonably certain prospect of a backpay award," employers "have little incentive to shun practices of dubious legality." *Albemarle Paper*, 422 U.S. at 417.

All this is true where the discriminatee is an "unauthorized alien" employee. As the Board explains in its *A.P.R.A.* decision, awarding at least a limited amount of backpay to unlawfully discharged "unauthorized alien" employees works to deny the employer any "illegitimate economic advantage" stemming from the employer's unlawful conduct and, thus, "act[s] as a deterrent to such unprincipled and opportunistic employers." 320 NLRB at 414.

ii. So far as we are aware, the sole counterargument based on "the award provisions of the NLRA"—*viz.*, on NLRA § 10(c)—is that laid out by Judge Beezer in his dissenting opinion in *Local 512, Warehouse & Office Workers v. NLRB (Felbro)*, 795 F.2d 705 (9th Cir. 1986). *See Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992). Judge Beezer began from the premise that NLRA relief is "remedial, not punitive, in nature" and "should be awarded only to those individuals who have truly suffered harm." *Felbro*, 795 F.2d at 725 (Beezer, J., dissenting). It followed, in his view, that "[a]n alien who had no right to be present in this country at all, and consequently had no right to employment has not been harmed in a *legal* sense by the deprivation of employment to which he had no entitlement," and, there being no harm in this legal sense, that the Board cannot, consistent with NLRA § 10(c), award backpay. *Id.* (emphasis added).

The flaw in this statutory argument is that it fails to apprehend that "the proceeding authorized to be taken by the Board under the National Labor Relations is *not* for the adjudication of *private* rights." *National Licorice*, 309 U.S. at 362 (emphasis added). Rather, "[t]he immediate object of the proceeding is to prevent unfair labor practices which, as

defined by §§ 7, 8, are practices tending to thwart the declared policy of the Act." *Id.* at 363. Thus, "[t]he power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Automobile Workers v. Russell*, 356 U.S. 634, 642-643 (1958).

That being so, an employee's lack of personal "entitlement"—in the sense of a lack of a legal right to the job the employee in fact held and filled by doing the employer's work—does not stand in the way of ordering an employer who has discriminatorily discharged the employee to take affirmative remedial action in the form of backpay to the discriminatee as the Board deems "necessary to 'dissipate the deeply coercive effects upon other employees who may desire self-organization, but have been discouraged therefrom by the threat to them implicit in the discrimination.'" *Earle Industries, Inc.*, 315 NLRB 310, 316 (1994). *See McKennon v. Nashville Banner*, 513 U.S. at 362.

It is very much to the point that, in cases of an employer discriminatory discharge in violation of the NLRA, "[t]he employer is a wrongdoer" who has "acted out of a motive that is declared illegitimate by the statute." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983). And, for the reasons we have just discussed, freeing the employer from responsibility for the economic con-sequences of his wrongdoing—because of some dereliction on the part of his victim that did not figure in the employer's wrongful action—disserves the "public interest in deterring such [wrongdoing]." *Mastro Plastics*, 354 F.2d at 175.

C. As we have seen, in cases involving the employer discriminatory discharge of "unauthorized alien" employees in violation of the NLRA, the NLRB has tempered its normal reinstatement and backpay remedy in order to take account of IRCA and of the overall policies of the immigration laws. And, as we have noted, where an administrative agency

proceeds by elaborating its organic statute in this manner, a reviewing court is called upon to decide whether the agency's "attempt to determine . . . to what extent those policies can be reconciled within the framework of the [agency's enabling] laws can[] be considered reasonable." *New York Shipping Ass'n v. Federal Maritime Comm'n*, 854 F.2d 1338, 1365 (D.C. Cir. 1988).

i. In considering whether the NLRB took proper account of the immigration laws in crafting its *A.P.R.A.* limited backpay remedy it is critical to recognize that nothing in IRCA, or in any immigration statute, expressly or implicitly, bars the provision of a backpay remedy to "unauthorized alien" employees for an employer's wrongful action against the employee in violation of a federal labor law. Nor can any claim be made that an employer would violate any provision of IRCA by making an administrative agency-ordered payment to an "unauthorized alien" employee in an amount that makes the employee whole for the harm worked by an employer action in violation of a federal labor law—such as a discriminatory discharge in violation of the NLRA. There is thus no "true conflict" between the *A.P.R.A.* limited backpay remedy for cases like this case and the immigration laws. *New York Shipping*, 854 F.2d at 1367.

ii. That being so the determination by the NLRB of the proper intersection between the NLRA and the immigration laws presents an occasion where the "agency is required by its own organic law to consider congressional policies articulated in other statutes," and to "explain why the action taken [by the agency] minimizes to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime." *New York Shipping*, 854 F.2d at 1367 & 1370.

In making that determination the *A.P.R.A.* Board began from the the entirely accurate understanding that, by "prohibiting employers from knowingly hiring or continuing to

employ undocumented aliens" in IRCA, "Congress intended to discourage employers from hiring undocumented aliens and thereby to gain control of the flow of illegal workers into this country." *A.P.R.A.*, 320 NLRB at 413 *citing* H.R. Rep. No. 99-682(I), 99th Cong., 2d Sess. 46 (1986).

The Board then reasoned that "providing the aliens, once they are hired, the same protections, most prominently those provided under the National Labor Relations Act, afforded to American employees was the most effective means of eliminating the economic incentives for employers to hire undocumented aliens." 320 NLRB at 414. The Board's reasoning in this regard is unassailable. As this Court noted in *Sure-Tan*:

> If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws. [467 U.S. at 893-894.]

In addition, the *A.P.R.A.* Board noted that leaving undocumented workers "powerless and desperate" in the face of employer unfair labor practices would tend to create a "ready supply of individuals willing to work for sub-standard wages in unsafe workplaces, with unregulated hours and no rights of redress," allowing "unscrupulous employers" to "turn away Americans and legally working alien applicants who hesitate to accept the same conditions." 320 NLRB at 414.

Again, the Board's reasoning resonates with this Court's recognition in *Sure-Tan* that "[a]pplication of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893. Indeed, as the

Board noted, the Report on IRCA of the House Judiciary Committee quoted this passage from *Sure-Tan* in emphasizing that "[i]t is not the intention of the Committee that the employer sanctions provisions of [IRCA] be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal . . . labor relations boards . . . to remedy unfair labor practices committed against undocumented employees for . . . engaging in activities protected by existing law." H.R. Rep. No. 99-682 (I) at 58. *See also* H.R. Rep. No. 99-682 (II), 99th Cong., 2d Sess. 8-9 (1986).

iii. Finally, the *A.P.R.A.* Board emphasized that where an employer acts to terminate the employment of an "unauthorized alien" employee by discriminatorily discharging the employee in violation of the NLRA—and there is no other intervening action or event that makes the discriminatee unavailable for continued employment with the employer—an *A.P.R.A.* limited backpay remedy does not serve as an inducement or encouragement to the discriminatee or the employer to take any action violative of the immigration laws. In contrast to the *Sure Tan* "deportation" unfair labor practice cases, in "discriminatory discharge" unfair labor practice cases "the employees remain in the United States," and are thus available for continued employment with the employer and it "does not promote [violation of the immigration laws by encouraging] illegal entry," or otherwise, to provide a "backpay remedy [that] serves to place the employees for a limited time in the position that they would have been but for the Respondent's unlawful conduct." 320 NLRB at 416. "Nor does the backpay, as limited by [the *A.P.R.A.*] decision, induce the Respondent [employer] to illegally rehire the discriminatees in order to terminate its backpay liability." *Id.*

Conversely, as the Board noted, "the failure to order such a remedy in cases such as this"—a limited backpay remedy that does not conflict with the immigration laws or induce or

encourage actions violative of the immigration laws—"provides employers an incentive to disregard their obligations under Federal labor and immigration laws." *Id.* at 416 n. 43. *See McKennon*, 513 U.S. at 362.

2. As we noted at the outset, Hoffman Plastic's challenge to the NLRB backpay order in this case rests entirely on the categorical assertion that "*Sure-Tan* stands for the proposition that a worker who is not both lawfully present and legally authorized to obtain work in the United States may not receive backpay as compensation for a violation of the NLRA," Pet. Br. 5-6, an assertion that the Company rests on its reading of a single paragraph in Section IV A of the *Sure-Tan* opinion. Neither the *Sure-Tan* opinion as a whole, nor the Section IV A paragraph Hoffman Plastic cites, stand for the categorical rule that back pay orders will not lie in NLRA cases involving "unauthorized alien" employees.

A. *Sure-Tan* arose in 1977 at a time when the federal immigration laws addressed "the terms and conditions of admission to the country" but not "the employment relationship between an employer and an undocumented alien." 467 U.S. at 892 & 893 (internal quotation marks and citation omitted). The case implicated the proper relationship between the NLRA and the immigration laws, because the *Sure-Tan* employers were charged with violating the NLRA by discriminatorily reporting five of their employees as "unauthorized aliens" to the Immigration and Naturalization Service in retaliation for the employees' union activity—with the result that the INS arrested the five workers and, as an alternative to procuring a formal deportation order, had each of the workers execute an INS Form I-274, acknowledging his illegal presence in the United States and agreeing to immediately depart the country, which departure was effectuated on the very day of the arrest. *NLRB v. Sure-Tan,*

Inc., 672 F.2d 592, 599 (7th Cir. 1982).[4] Under the Immigration and Naturalization Act, these "unauthorized alien" workers could not lawfully reenter the United States unless and until the aliens secured the proper immigration documents.

In response to charges filed by the union, the NLRB General Counsel issued a complaint alleging that the *Sure-Tan* employers "caused the discharge of five employees by writing the Immigration and Naturalization Service and asking them to check their status which resulted in their deportation and that such action was motivated by the employees' support for the Union." *Sure-Tan, Inc.*, 234 NLRB 1187, 1191 (1978). That complaint generated a convoluted set of NLRB and court of appeals proceedings that focused on the proper remedy in an NLRA case in which the employer's unfair labor practice accomplished the deportation of the "unauthorized alien" discriminates.

i. In the first instance, the NLRB Administrative Law Judge concluded that the employers' "request to investigate the immigration status of its employees was motivated by its employees' support of the Union" and "that the discriminatees' subsequent deportation was the proximate result of the discriminatorily motivated action by [the employers] and constitutes a constructive discharge violative of Section 8(a)(3) and (1) of the Act." 234 NLRB at 191.

"Because the discriminatees were promptly deported to Mexico" and "because they were admittedly illegal aliens," the ALJ concluded that "the conventional remedy of backpay and reinstatement appears inadequate since being physically

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[4] The Form I-274 procedure "has been called a 'rough immigration equivalent of a guilty plea." *Conteras-Aragon v. INS*, 852 F.2d 1088, 1094 (9th Cir. 1988)(*en banc*). *See* 8 C.F.R. § 242.5 (1981)("Voluntary departure prior to hearing."). The vast majority of INS arrests result in the use of this procedure to effect a "voluntary deportation without a formal hearing." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

unavailable for employment nullifies any backpay liability and their inability to return to the United States renders reinstatement at best an unlikely prospect." 234 NLRB at 1192. Accordingly, the ALJ recommended that "a reinstatement order be expanded to a 6-month period." *Id.* While believing himself constrained to deny backpay altogether by "past Board precedent which tolls backpay where an employee is not available," the ALJ "invited [the Board] to consider awarding backpay for at least a minimum period of 30 days (or 4 weeks)." *Id.* at 1193.

ii. Ruling on cross-exceptions to the ALJ's decision, the NLRB sustained his finding that the *Sure-Tan* employers had "constructively discharged five of [their] Mexican employees in violation of Section 8(a)(3) of the Act." 234 NLRB at 1187. The Board concluded, however, that the ALJ had taken an "unnecessarily speculative" approach in recommending that the reinstatement order be held open for six months, "because he was of the opinion that the inability of the discriminatees to return to the United States rendered reinstatement 'at best an unlikely prospect,'" and in denying backpay, "because of his finding that the deported employees were physically unavailable for work." *Id.*

The Board noted that "[w]hile it is not disputed that the discriminatees were deported in February 1977, there is no evidence in the record that they have not returned to the United States." 234 NLRB at 1187. Accordingly, the Board decided to issue the "conventional remedy for a violation of Section 8(a)(3)"—an order requiring reinstatement with backpay—and explained that "[t]he appropriate forum for determining the issues relating to the[employees'] availability for work [would be the later] compliance proceeding." *Id.*

The NLRB General Counsel then moved for modification of the Board's order on the grounds that the order was "contrary to national immigration law and policy" in that it

"encourag[ed] deported discriminatees to return as quickly as possible to claim their jobs and backpay rather than wait until an uncertain date when they might be able to reenter the United States legally." *Sure-Tan, Inc.*, 246 NLRB 788, 788 (1979). The General Counsel suggested that the order be "clarified to require an offer of reinstatement only to those discriminatees who are able to reenter the United States lawfully" and to provide for "backpay [that] accrue[s] only from the time a lawfully returned discriminatee is denied employment after his return." *Id.* The Board, over the dissents of two members, denied the General Counsel's motion on the ground that it was not "within [the Board's] authority to alter the obligations imposed by the Act in a manner which might assist in reaching whatever may be the current goals of immigration policies." *Id.*

iii. On the *Sure-Tan* employers' petition for review, the Seventh Circuit held that "the Board correctly concluded that Sure-Tan constructively discharged the[] five employees in violation of section 8(a)(3)." 672 F.2d at 602. The court of appeals went on, however, to modify the Board's order in two respects:

- *First*, the court of appeals placed conditions on the Board's reinstatement and backpay remedy. To ensure that the reinstatement order did not encourage the deported discriminatees to "enter the United States to claim the[proffered] jobs without proper documents," the court of appeals modified the order "to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement." 672 F.2d at 605-606. "Consistent with [this] requirement," the court also "modif[ied] the Board's order so as to make clear" that "in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *Id.* at 606.

• *Second*, having limited reinstatement and backpay in those ways, the court went on to expand the Board's order in a different direction. To "afford the discriminatees a liberal but reasonable opportunity to reclaim their jobs," the court required that the reinstatement "offer should remain open for a period of four years" and that the offer be "delivered to the discriminatees in a manner allowing verification of receipt and . . . written in the discriminatee's native language (Spanish)." 672 F.2d at 606. And, to ensure that the discriminatees would receive at least some backpay, even if they did not lawfully return to the United States, the court "set[] a minimum period of six months during which backpay will be awarded in any event." *Id.*

B. After these proceedings the *Sure-Tan* case reached this Court on the employers' petition for *certiorari*. In deciding the case, this Court gave equal attention to the two novel substantive questions the case raised and to the novel remedial questions it also raised.

As to the substantive issues, the Court "first consider[ed] the predicate question whether the NLRA should apply to unfair labor practices committed against undocumented aliens." 467 U.S. at 891. Answering that question "yes," the Court stated that "[t]he Board has consistently held that undocumented aliens are 'employees' within the meaning of § 2(3) of the Act," and that "[t]he terms and policies of the Act fully support the Board's interpretation in this case." *Id.*

In addition to finding that "the Board's categorization of undocumented aliens as protected employees furthers the purposes of the NLRA," 467 U.S. at 892, the Court also found that "enforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA," *id.* at 893. The Court explained that "[i]f an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident

workers, any incentive to hire such illegal aliens is correspondingly lessened," and "if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws." *Id.* at 893-894.

The Court next "address[ed] the more difficult issue whether, under the circumstances of this case, petitioners committed an unfair labor practice by reporting their undocumented alien employees to the INS in retaliation for participating in union activities." 467 U.S. at 894. The difficulty is that "[t]he reporting of any violation of the criminal laws is conduct which ordinarily should be encouraged, not penalized." *Id.* at 895. But notwithstanding that, the Court concluded that it is "consistent with the polices of both the INA and the NLRA" for the Board to find an unfair labor practice "when the evidence establishes that the reporting of the presence of an illegal alien employee is in retaliation for the employee's protected union activity." *Id.* 895-896.

Only after having thoroughly considered these two substantive issues did the *Sure-Tan* Court, in section IV of its opinion, come to the "petitioners' challenges to the remedial order." 467 U.S. at 898. The Court framed its discussion of those issues by noting that the "[p]etitioners attack those portions of the Court of Appeals' order which modified the Board's original order by providing for an irreducible minimum of six months' backpay for each employee and by detailing the language, acceptance period, and verification method of the reinstatement offers," but that the petitioners did *not* "appear to challenge the court's modifications of the Board's remedial order conditioning acceptance of the reinstatement offers and the accrual of any backpay upon the discharged employees' legal presence in this country." 467 U.S. at 898 & n. 8. *See also id.* at 903 n. 12 (delineating which aspects of the court of appeals' remedial order were being challenged and which aspects were not).

Given what the petitioners put into dispute, Section IV A of the *Sure-Tan* opinion—which contains the paragraph on which Hoffman Plastic builds its case—is, in the Court's words, addressed to the following question:

> [whether] the Court of Appeals *impermissibly expanded* the Board's original order to provide that each discriminatee would receive backpay for at least six months on the ground that "six months is a reasonable assumption" as to the "minimum [time] during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice." 672 F.2d, at 606. [467 U.S. at 899. (emphasis added).] [5]

The *Sure-Tan* Court answered that question "yes," and did so on two grounds:

> • *First*, the Court held that the court of appeals had "overstep[ped] the limits of its own reviewing authority," and "usurped the delegated function of the Board to decide how best to appraise the relevant factors that determine a just backpay remedy." 467 U.S. at 900 & n. 10. The Court explained that NLRA § 10(c) "vest[s] in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Id.* at 898-899.
>
> • *Second*, the Court held that "the Court of Appeals' award of a minimum amount of backpay in [*Sure-Tan*] is not sufficiently tailored to the actual, compensable injuries suffered by the discharged employees" in that

[5] Section IV B in its turn is addressed to whether the court of appeals "exceeded its limited authority of judicial review by modifying the Board's order so as to require petitioners to draft the reinstatement offers in Spanish and to ensure verification of receipt" and by "requir[ing] that the reinstatement offers be held open for four years." 467 U.S. at 905.

> "[t]he court's imposition of this minimum backpay award in the total absence of record evidence as to the circumstances of the individual employees constitutes pure speculation and does not comport with the general reparative policies of the NLRA." 467 U.S. at 901.

After answering the question posed for decision at the outset of Section IV A, the Court, in the paragraph Hoffman Plastic invokes, considered the "portion of the Court of Appeals [*Sure-Tan*] remedial order" limiting the Board's original remedial order in that case "with which the Board has clearly indicated its agreement." 467 U.S. at 903, n. 12. In its entirety that paragraph states:

> Nonetheless, as the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings *must be conditioned upon the employees' legal readmittance to the United States.* In devising remedies for unfair labor practices, the Board is obliged to take into account another "equally important Congressional objectiv[e]," *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)—to wit, *the objective of deterring unauthorized immigration that is embodied in the INA.* By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States. Cf. 3 NLRB Casehandling Manual §§ 10612, 10656.9 (1977). [467 U.S. at 902-903 (emphasis added; footnote omitted).]

The Court thus plainly instructed that the Board, in carrying out its "primary responsibility and broad discretion," 467 U.S. at 898, "in divising remedies for unfair labor practices, . . . is obliged to take into account the 'equally

important Congressional objectiv[e]' . . . of deterring unauthorized immigration that is embodied in the [immigration laws]," *id.* at 902-903. As we have stressed, the *A.P.R.A.* Board in divising limited remedies for the employer unfair labor practice of discriminatorily discharging "unauthorized alien" employees in violation of the NLRA, has responded to the Court's instruction by carefully and conscientiously taking into account the immigration laws' provisions and objectives, including those of IRCA which was enacted after *Sure-Tan* was decided.

But, contrary to Hoffman Plastic, the *Sure-Tan* Court did *not* go further and instruct the Board that it would be improper to provide for backpay in devising remedies, where the employer unfair labor practice accomplishes the discriminatory discharge of an "unauthorized alien" employee, that both effectuate the NLRA's policies and take proper account of the immigration laws. Rather, the Court, in approving the court of appeals' limitation on the *Sure-Tan* reinstatement and backpay order, confirmed that a backpay remedy would be improper where employer's unfair labor practice accomplishes the deportation of an "unauthorized alien" employee and a standard backpay order would serve as an inducement to the deported worker to illegally reenter the United States.

The point of the Section IV A paragraph in this regard as stated in its topic sentence is a point that goes only to the *Sure-Tan* class of cases: "[A]s the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States." 467 U.S. at 902-903.

The Board's original *Sure-Tan* reinstatement and backpay order, as the NLRB General Counsel pointed out, was "contrary to national immigration law and policy" in that it "encourag[ed] deported discriminatees to return as quickly as

possible to claim their jobs and backpay." 246 NLRB at 788. The cure, said the General Counsel, was to "require an offer of reinstatement only to those discriminatees who are able to reenter the United States lawfully," and to provide for "backpay . . . accru[ing] only from the time a lawfully returned discriminatee is denied employment after his return." *Id.* On review of the Board's *Sure-Tan* decision, the court of appeals agreed with the General Counsel's assessment of the Board's original order and acted to limit the order as the General Counsel had suggested.

This Court, in its turn, approved of the court of appeals' action conditioning reinstatement "upon the employees' *legal readmittance* to the United States" on the ground that it properly furthers "the objective of deterring unauthorized immigration that is embodied in the INA." 467 U.S. at 903 (emphasis added). As indicated by the conjunction "similarly" between the two sentences in the *Sure-Tan* Section IV A paragraph discussing the limited reinstatement order and the single sentence setting forth the limited backpay order, the two limitations are *in pari materia* and this Court's ground for approving the latter is as one with its ground for approving the former. The condition on backpay is proper as a means of ensuring that a Board backpay order does not stand as an inducement to deported unauthorized alien discriminatees to reenter the country illegally.

All of this has to do with the proper NLRA remedy, that takes account of the immigration laws and their objectives, for employer unfair labor practices that accomplish the deportation of an "unauthorized alien" employee. None of it speaks to the proper NLRA remedy for employer unfair labor practices that accomplish the termination of an "unauthorized alien" employee's employment with the employer but not his deportation—where a limited backpay remedy, like the one the Board devised in it's *A.P.R.A.* decision does not conflict

with the immigration laws or their objectives or serve as an inducement to the discriminatee to take action violative of the immigration laws.

That the *Sure-Tan* Court did not mean to categorically preclude backpay orders for "unauthorized" alien discriminatees is shown by the Court's suggestion that "an appropriate period of backpay" could be fashioned on the basis of "evidence . . . as to the period of time the[] particular employees might have continued working before apprehendsion by the INS." 467 U.S. at 902 n. 11. Thus, for example, if the *Sure-Tan* employers had discriminatorily discharged the employees in violation of the NLRA *before* calling in the INS, the Court recognized that it would have been proper for the Board to award backpay for the period between the unlawful discharge and the employees' "apprehension by the INS." And, this would be so, even though the employees would not have been "lawfully entitled to be present and employed in the United States," *id.* at 903, during that period. *See Sure-Tan*, 246 NLRB at 791 (Member Murphy dissenting)(suggesting that "[o]ne possible way to meet the need for . . . reasonable accommodation [with the immigration laws] would be to limit the backpay period to the time from the date of discharge to the date of deportation").

This understanding of *Sure-Tan's* reach is reinforced by *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), which issued ten days after *Sure-Tan* and treats the remedial section of *Sure-Tan* as addressing a "[s]imilar[]" problem to the one presented in *Lopez-Mendoza*. 468 U.S. at 1047 n. 4.[6] *Lopez-*

[6] *Lopez-Mendoza* holds that the exclusionary rule, which applies in a criminal proceeding designed to "punish [the defendant's] past transgressions," does not apply to a deportation proceeding designed to prevent the unauthorized alien from engaging in his "continuing violation[]" of the immigration laws. 468 U.S. at 1046. In so holding, the *Lopez-Mendoza* Court explained that, while application of the exclusionary rule may prevent the punishment of the defendant's past transgressions and thus "allow the criminal to go free," *id.* at 1047, it should not "be invoked to prevent an agency from ordering corrective action," *id.* at 1046.

Mendoza explains that *Sure-Tan* drew on the distinction between "punish[ing] past transgressions" and "prevent[ing] their continuance or renewal" relevant to the exclusionary rule issue in *Lopez-Mendoza* in treating with proper remedial orders in unfair labor practice cases involving "unauthorized alien" discriminatees. 468 U.S. at 1046.

In the first place, *Lopez-Mendoza* explains that *Sure-Tan* allows the NLRB to impose "[r]*etrospective sanctions* against [an] employer" who was "guilty of an unfair labor practice in his dealings with an alien *notwithstanding the alien's illegal presence in this country*." *Id.* at 1047 n. 4 (emphasis added). The *A.P.R.A.* Board's limited backpay remedy for the employer unfair labor practice of discriminatorily discharging an "unauthorized alien" employee is just such a "retrospective sanction" that takes proper account of the immigration laws. In contrast, as *Lopez-Mendoza* also explains, under *Sure-Tan* "the employee is plainly not entitled to the *prospective relief* [of] reinstatement and continued employment" as long as "he maintains the status of an illegal alien." *Id.* at 1048 n. 4 (emphasis added).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record

Of Counsel:

MICHAEL RUBIN
177 Post Street
San Francisco, CA 94108